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Supreme Court of the United States

CINCINNATTI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY, *Appellant*,

vs.

INDIANAPOLIS UNION RAILWAY COMPANY, *et al.*, *Appellees*.

October Term, 1924.

Nos. ~~1009-1010~~ 328-329

APPELLANT'S REPLY BRIEF.

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Supreme Court of the United States

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY, *Appellant,*

against

INDIANAPOLIS UNION RAILWAY COMPANY, *et al.,* *Appellees.*

Nos. 1009 and 1010 October Term, 1924.

APPELLANT'S REPLY BRIEF.

The argument of Appellees is that Appellant became bound by an executed contract of purchase from the Receiver of Chicago, Indianapolis & Western Railway Company, and that its petition to the District Court, of which that tribunal held it had not jurisdiction, was simply a suit seeking rescission of

> "Appellant's accepted contract with the Indianapolis Union Railway Company."

But from the beginning Appellant has contended that there never was "an accepted, binding, definite contract" between it and the Indianapolis Union Railway Company; that the minds of the parties had never met on the same proposition, and that while the decision of the District Court, which was affirmed by the Circuit Court of Appeals, and which this Court declined to review on certiorari, was adverse to its contention on this point, that decision bound Appellant by construction to a con-

tract which, in its own opinion, it never had made; a construction based upon provisions in the foreclosure decree, which, by the petition in the instant case, it sought to have modified so as to relieve it from the effect of a judicially imposed liability.

It should be remembered at the outset that two contracts had been made with the Indianapolis Union Railway Company; (1) between that Company and the Indianapolis, Decatur & Springfield Railway Company (afterwards called Indianapolis, Decatur & Western Railroad Company), and (2) between the Indianapolis Union and the Cincinnati, Hamilton & Indianapolis Railroad Company. After the consolidation of the Indianapolis, Decatur & Western Railroad Company with the Cincinnati, Hamilton & Indianapolis Railroad Company into the Cincinnati, Indianapolis & Western Railway Company, the latter Company recognized and complied with the obligations under both contracts. The mortgage of the Indianapolis, Decatur & Western Railroad Company foreclosed in the suit by the Central Trust Company of New York, only covered, as a part of the assets of the mortgagor Company, the contract between the Indianapolis Union Railway Company and that single Company. The First and Refunding Mortgage of the Cincinnati, Indianapolis & Western Railway Company covered all the properties of that Company, including the contractual interests of both of its constituent companies with Indianapolis Union Railway Company, but subject to the prior lien of the mortgage of the Indianapolis, Decatur & Western Railroad Company. The decree of foreclosure in each case contained the clause giving the purchaser, etc., the right for the period of thirty days after the delivery of the deed by the Special Master

> "to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company or its predecessors in title, and

> such purchaser, his successors or assigns, shall be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this Court within said period of thirty days." (Rec., p. 23.)

Each foreclosure decree also reserved for future adjudication all questions not thereby disposed of and provided that any party to the cause might at any time apply to the Court for further relief at the foot of the decree. (Rec., p. 26.) Within the specified time, Appellant filed the notice of election and rejection upon which this controversy has arisen. It proceeded on what may have been a mistaken legal basis, but certainly was the logical basis, namely, to reject the contract made by the Indianapolis, Decatur & Springfield Railway Company with the Indianapolis Union Company, and to adopt the contract made by the Indianapolis Company with the Cincinnati, Hamilton & Indianapolis Railroad Company. (Rec., p. 8.) Thereupon, objection to its right to take this action was made, not by its vendor, the Special Master, or the Receiver of Cincinnati, Indianapolis & Western Railway Company, but by Indianapolis Union Railway Company, and the two proprietary companies, who presented their petitions of intervention in the suit, were admitted as parties, and denied the right of Appellant "so to refuse and reject either of said two contracts", and asserted that Appellant was

> "bound by both of said two contracts for the use of the property of the Indianapolis Union Railway Company and is required to make payments upon each of said two contracts of the full amount that would have been payable thereunder by the Indianapolis, Decatur & Western Railway Company, and the Cincinnati, Hamilton & Indianapolis Railway Company, at this time, if the aforesaid consolidation had not been made and if the property

> of the Cincinnati, Indianapolis & Western Railway Company had not been sold under the decrees of the aforesaid court in the above entitled cause and the sale confirmed in the Cincinnati, Indianapolis & Western Railroad Company." (Rec., p. 65.)

They further averred that Appellant

> "in so attempting to refuse and reject one of said contracts and agreements for the use of the property of the Indianapolis Union Railway Company, and in so claiming the right to make such refusal and rejection, under the provisions of the decree of foreclosure and sale by which it acquired the title of the property of the Cincinnati, Indianapolis & Western Railway Company, is acting without warrant of law *and contrary to the provisions and intent of said decree of foreclosure* * * *". (Rec., p. 65. Italics ours.)

Here is the Appellees' own interpretation of Appellant's position at the time and continuously thereafter, namely, that

> "under the provisions of the decree of foreclosure and sale by which it acquired the title of the property of the Cincinnati, Indianapolis & Western Railway Company",

and within

> "the provisions and intent of said decree of foreclosure",

this Appellant was entitled to accept one of the two contracts made by its predecessors in title with the Indianapolis Union Railway Company, without becoming bound by the other one. After the courts decided against it on this contention, and held that the legal effect of its acts constituted an acceptance of both contracts, Appellant filed its petition with the District Court, averring its

mistake as to its rights and obligations under the said contract or contracts with the Indianapolis Union Railway Company as so interpreted, averring that its acceptance or rejection were done through and solely by reason of such mistake, and praying that it should be

> "permitted to rescind its acceptance of the said contract and that such rescission be ordered and that it be permitted to cancel all of the obligations arising under said contract or contracts dated September 20, 1883, and amendment of August 20, 1906, with The Indianapolis Union Railway Company, and that the foreclosure decree in this case be modified to the extent necessary",

and that it should have such further relief as the equity of the case might require and might seem meet. (Rec., p. 11.)

In the face of this record, it seems clear to us that the contention of Appellees that Appellants in their petition to the District Court did not seek modification of that Court's decree of foreclosure and, therefore, was not ancillary to the main cause, is refuted by the clear facts of the case.

On the hearing of Appellees' motions to dismiss Appellant's said petition, on the ground that the District Court was without jurisdiction to entertain it, the District Judge first said:

> "If by its action the petitioner is simply seeking to be relieved of the obligations of a contract admittedly entered into by it, upon the ground of mistake and without express reference to the right of election conferred by the decree of foreclosure, the relief sought is so independent of the former proceedings as to be in no sense ancillary or supplemental thereto." (Rec., p. 36.)

But, as above shown, this is not what the petitioner was seeking at all.

The Court then proceeded:

> "If, on the other hand, the question presented involves the construction to be placed upon the attempt of the petitioner to accept one contract and to reject the other, *under the foreclosure decree*, or if the petition seeks to relieve the petitioner from the full force and effect of the decisions in the prior litigation *and to procure such modification of the foreclosure decree* as will now enable the petitioner to make that election which it is stated it would have made but for its mistake as to the nature of the election afforded by the foreclosure decree and but for the mistake as to its then existing rights thereunder, we are clearly of the opinion that the present petition is ancillary and supplemental to the original actions, and that the court now has jurisdiction to consider the same." (Rec., p. 36.) (Italics ours.)

The hypothesis so stated by the Court is exactly the question presented to the Court by Appellant's petition, and the above quoted conclusion sustaining jurisdiction was, we submit, a sound one, and the District Court should be constrained by this Court to adhere to that position.

The District Court went further, and said:

> " * * * so also it would seem proper to entertain a bill to avoid an inequitable effect of the acts of the purchaser and to relieve such purchaser from the unintended effect of his act *under the decree*, where such act was the result of honest mistake upon the purchaser's part. This is especially so where, by the decree, the court reserves for future adjudication all questions not then disposed of and gives to any party to the cause the right to apply to the court for further relief at the foot of the decree." (Rec., p. 36.) (Italics ours.)

The Court added, two paragraphs further on in his opinion, the following:

> "What we have said we think disposes of the question of jurisdiction and of the contention of

> the defendants that the right of the petitioner *to change its election or to modify the foreclosure decree,* or to be relieved from the effect thereof, was exhausted by the prior proceedings in this court and on appeal." (Rec., p. 37.) (Italics ours.)

Having thus sustained the jurisdiction of the Court, and held Appellants to be *prima facie* entitled to the relief sought, the District Judge next proceeded to deal with the various defenses to the granting of that relief. He overruled Appellees' contention that the mistake was one of fact and not of law, and, therefore, the Court had no jurisdiction to grant the relief, (Rec., pp. 37-38); and that no relief could be granted because the mistake was unilateral. (Rec., pp. 38-39.) Finally he turned to the consideration of the defense of laches, distinguishing between laches, on the one hand, and waiver or acquiescence, on the other, and said:

> "If not constituting laches in the technical sense, because of lack of prejudice to the Indianapolis Union Railway Company arising from the delay, yet the delay of the petitioner for more than two years to assert its right to rescission, after express knowledge that it could not adopt and assume one contract and reject the other, or assert the right it now claims to rescind both contracts, is highly indicative of the then intention upon its part to make the best of a bad election and retain the use of the terminal facilities upon the payment of two-thirteenths of the fixed rental." (Rec., p. 40.)

The Court dwelt upon the fact that the delay in asserting these rights was not explained, and held that the failure of Appellant for two years to move to rescind its former action and the payment by it of the rentals falling due under both contracts during this period, in effect made a new election and either waived any rights which might have then existed by reason of the initial mistake, or so acquiesced in the situation in which it found itself,

as to preclude relief upon the grounds then urged, saying:

> "The situation has changed from one in which the petitioner is asking to be relieved from the effect of an election which it never intended to make, to one in which the petitioner can only ask to be relieved of an election intentionally made under misapprehension as to its rights." (Rec., p. 41.)

The situation thus presented, the Court held, had a direct bearing upon the question of jurisdiction.

> "If, abandoning reliance upon the original mistake set up in the bill, the petitioner alleges that its subsequent election was made in ignorance of its right to appeal to a court of equity for relief as from the original election, the petitioner is confronted with the fact that the granting of the relief prayed for in no way involves a construction of the original foreclosure decree nor the construction to be given to any act thereunder. It could only be urged that a right of rescission existed because of facts independent of the foreclosure decree and constituting merely the conditions under which the election was voluntarily exercised. The determination of this question would be separate and distinct from all questions originally before the court and not ancillary or supplementary thereto." (Rec., p. 41.)

But this hypothesis of the Court was not founded on any fact. Appellant did not abandon reliance upon the original mistake, nor assume or admit that it had made a subsequent election from which it asked to be relieved. On the contrary, immediately upon the rendition of this opinion by the District Court, Appellant filed an amendment to its petition, setting forth that it never had intended to acquiesce and did not acquiesce in the decision requiring it to pay two-thirteenths of the rental, contrary to its expressed intention not to do so by the original election filed herein, and averred that it had attempted in

various other ways for a reasonable time, to be relieved of such obligation without recourse to law; that its President had made remonstrances and efforts to be relieved of the unjust burden of said contract; that it made the payments under protest, and that none of the Appellees were in any way prejudiced by the length of time which had elapsed between the time of application for the writ of certiorari and the filing of the petition herein (Rec., pp. 43, 44), and thereupon it renewed its application to the Court for the relief prayed for in the petition thus amended. In other words, Appellant consistently stood on the rights asserted in its petition, and urged its right to the relief therein prayed, namely, rescission of its acceptance of both contracts to which the District Court and Circuit Court of Appeals had committed it, and permission to cancel all of the obligations arising thereunder, and that the foreclosure decree be modified to the extent necessary to the granting of that relief. Confronted with this situation, the District Court thereupon shifted its ground. It said:

> "While the court, in its previous opinion, treated the question as if petitioner were vested with the power of election to accept or reject the contracts in question, *it is to be noted that this was perhaps an unhappy method of expressing petitioner's rights.*" (Rec., p. 46. Italics ours.)

The Court thereupon gave a new construction to the case, by holding that as soon as Appellant was advised that its attempt to reject the contract of one of its predecessors in title was ineffective, and the mistake of law under which the petitioner labored was fully disclosed,

> "*the instant duty* of announcing its purpose to reject both contracts and of adhering to the purpose so announced, was emphasized" (Rec., p. 46). (Italics ours.)

The Court did not take pains to point out any principle of law creating this "instant duty". Appellant had the right to apply to the Court for relief from the construction put by the Court upon Appellant's acts pursuant to the provisions contained in the foreclosure decree, based upon the mistaken view of its rights and the effect of its acts. The Court treats the case as though, on the final determination of the original petition by the refusal of this Court to grant certiorari, everything that Appellant had done was sponged out, and it stood confronted *de novo* with the requirements of the foreclosure decree, within thirty days after such final determination to elect *de novo* whether or not to assume or adopt any lease or contract made by the consolidated Company or its predecessors in title. This is a new doctrine of rescission—rescission *ipso facto* by the refusal of the Court to give a construction to what had been done in conformity with the Appellant's prayer, and the imposition upon it of a new obligation based upon such rescission or wiping out of what previously had been accomplished. In other words, having decided that Appellant was bound by a contract created by judicial construction, the Court then held that this contract might be rescinded only if Appellant applied within thirty days for that relief, and announced this decision two years after the thirty days had expired! We believe there is no basis in law, and certainly we have found no decision, which will sustain any such extraordinary doctrine as this. Whether or not Appellant is properly precluded from securing the relief prayed in this cause by laches or acquiescence, goes not to the jurisdiction of the District Court, but to the question of whether or not its petition shall be granted, and from the decision on that point, Appellant is entitled to a review by appeal in due course. But under every principle applicable to ancillary jurisdiction, the District Court has the power and the duty of considering the petition on its merits.

The Appellees apparently think it is not quite safe to stand on this doctrine of the District Court. They say in their brief (p. 12), that the "accepted contract"—meaning the judicially imposed contract resulting from the action taken by the Appellant pursuant to the foreclosure decree,

> "became in all respects valid and binding on appellant either * * * (*c*) within a reasonable time after May 1, 1922, the day that this court denied the writ of certiorari in the prior litigation."

And again, on page 19 of their brief, they complain that Appellant did not take any action whatever by way of rejecting said contract

> "within thirty days, *or a reasonable time,* after February 7, 1922, the date on which the Circuit Court of Appeals affirmed the decree of the District Court in the prior litigation (R., 109-118). Nor—coming to the very latest date that can possibly be taken—did appellant take any action whatever by way of rejecting said contract within thirty days, *or a reasonable time,* after May 1, 1922, the date on which this court denied appellant's petition for a writ of certiorari (258 U. S. 629)."

And again, on page 20, after quoting from the opinion of the District Court to the effect that the Appellant had an election to reject both contracts or neither, they say:

> "Such option to reject expired, at the very latest, on May 31, 1922, *or within a reasonable time after May 1, 1922.*"

In other words, their main contention is that Appellant's right to reject or to accept both contracts had to be exercised within a reasonable time after May 1, 1922, not as the District Court held, that it was the "instant duty" of Appellant to act. But what is a reasonable time

depends upon the circumstances of the case, and the amendment to Appellant's petition in the court below (Rec., pp. 43-44) states facts showing why Appellant delayed action until the date of the filing of its petition, July 2, 1924. (Rec., pp. 1-11.) The District Judge, in his first opinion, dealt with the question of laches or waiver by saying:

> "The defense of laches ordinarily contemplates either such long delay as to inconvenience the parties in the preparation and presentation of their defense, through the loss of evidence and the fallibility of the memory of witnesses, or such change in the condition and relations of the parties during the period of delay that it would be an injustice to the defendant to permit the plaintiff to assert his rights. Properly speaking, mere delay short of the period of limitations is insufficient to constitute laches. There must be something in the nature of estoppel, some change in the position of the adverse party which makes it inequitable to proceed against him." (Rec., pp. 39-40.)

But when it came to the application of this rule, the Court invoked another principle, namely, that although not constituting laches, Appellant's delay for more than two years to assert its right of rescission was indicative of intent to waive its rights. In other words, he proceeded to decide the case, not on the ground of laches, but of waiver. Then, when the amendment was presented stating facts which clearly rebutted any presumption of waiver, the Court shifted his ground, and adopted the theory of "instant duty of announcing its purpose to reject both contracts", which Appellees modify by transmuting into a duty to act within a *reasonable* time, which again comes down to a matter of defense to Appellant's claim, and does not go to the jurisdiction of the District Court. We have discussed the authorities on the subject of laches and acquiescence. We insist

that Appellant has not been guilty of laches or of acquiescence, as those terms are defined in the law. These points we have discussed in our principal brief, and it is not necessary to repeat them here. We here are simply meeting and attempting to controvert the extraordinary contentions advanced by the District Judge, and to some extent adopted by counsel for Appellees, of a new and substituted obligation imposed upon Appellant on the determination of the previous controversy and of a barrier to the consideration of its right to equitable relief erected upon this assumed hypothetical and unwarranted construction.

Respectfully submitted,

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